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Supreme Court of the United States

OCTOBER TERM, 1976

No. 77-335

OPPENHEIMER FUND, INC., OPPENHEIMER MANAGEMENT CORP., OPPENHEIMER & CO., LEON LEVY, JACK NASH, EDMUND T. DELANEY AND EMANUEL CELLER,

Petitioners,

v.

IRVING SANDERS, EGON TAUSSIG, MICHAEL SHAEV AND RITA SHAEV,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

October 7, 1977

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REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Pursuant to Rule 24(4) of this Court, Petitioners ("defendants") submit this Reply in support of their Petition for a Writ of Certiorari (the "Petition") to the United States Court of Appeals for the Second Circuit,[1] docketed with this Court on September 1, 1977.

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[1] The opinion of the three-judge panel of the Court of Appeals (App. C, p. 11a.) has been reported at 558 F.2d 636, and the subsequent opinion of the Court of Appeals on rehearing en banc (App. E, p. 34a.) has been reported at 558 F.2d 646, since the filing of the Petition.

The question here presented for review is whether, in a class action under Rule 23(b)(3), any of the defendants can be required to bear the substantial expense of identifying and assembling the names and addresses of class members for the purpose of relieving Respondents ("plaintiffs") of that obligation incident to sending the initial class action notice required by Rule 23(c)(2).

As set forth in the Petition (pp. 5, 10, 25), this question arose in connection with plaintiffs' motion for class determination under Rule 23(c)(1). Plaintiffs did not attempt to use the discovery procedures to obtain the class members' names and addresses. The district court below did not purport to act under the Federal discovery rules in making its September 30, 1975 order, which directed the defendant Oppenheimer Fund, Inc. (the "Fund") to bear the costs of class member identification. There has been no compliance or attempt to comply with the procedural requirements of the Federal discovery rules in this case.[2]

Although the record establishes beyond question that the order appealed from did not arise out of a proceeding under the discovery rules, plaintiffs' brief in opposition to certiorari argues as if they had sought class member identification and as if the district court had ordered the Fund to pay the costs thereof under the authority of those

[2] For this very reason, the United States Court of Appeals for the Third Circuit held that non-party broker-dealers could not be required to pay the costs of class member identification, when plaintiffs there argued for the first time on appeal that such was a cost of discovery allocable in the discretion of the district court. *In re Penn Central Securities Litigation*, No. 76-2139, Slip op. at 13 (3d Cir. August 5, 1977). Indeed, the Third Circuit distinguished the en banc decision of the court below on the erroneous assumption that the procedural requirements of the Federal discovery rules had here been satisfied. *Id.* at 13.

rules.[3] Starting from these invalid premises, plaintiffs' brief is devoted to a lengthy and irrelevant discussion of the trial court's discretionary power to allocate *discovery costs* and the scope of appellate review of such non-relevant discretion.[4]

Plaintiffs' attempt to subsume class action notice requirements under the discovery rules should not obscure the three substantial grounds for granting certiorari in the instant case, namely: (1) the decision below directly conflicts with the decision of this Court in *Eisen IV*[5] on the proper incidence of notice costs in maintaining Rule 23(b)(3) class actions, a matter of national importance in view of the substantial burdens class actions place on federal courts; (2) the decision below is in direct conflict with the decision of the Fifth Circuit in *In re Nissan Motor Corp. Antitrust Litigation*, 552 F.2d 1088 (5th Cir. 1977), on the same question; and (3) in erroneously attempting to negate application of this Court's decision in *Eisen IV*, the decision below will have the effect of improperly authorizing discovery outside the scope permitted by Rule 26(b)(1).

[3] As indicated in the Petition, the discovery rationale has its origins in the en banc majority opinion. (App. E, p. 40a.) The district court appears to have considered the issue of the incidence of class member identification costs as governed by the notice provisions of Rule 23(c)(2). (App. A, pp. 2a, 7a.)

[4] Since it is not material to the Petition, defendants merely note at this time without extensive correction that plaintiffs' "Statement of the Case" is erroneous in a number of significant respects, including the claim that plaintiffs' proposed class redefinition would obviate the need to cull out names and addresses and the claim that defendants opposed such redefinition in their own interests "presumably" because of the limited res judicata effect.

[5] *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156 (1974) (*"Eisen IV"*), *vacating*, 479 F.2d 1005 (2d Cir. 1973).

I.

Plaintiffs' Contentions Lack Merit on the Issue that the Decision Below Directly Conflicts with the Decision of this Court in *Eisen IV* on a Matter of National Importance.

In *Eisen IV*, this Court decided that the usual rule is that a "plaintiff must pay the cost of notice as part of the ordinary burden of financing his own suit." 417 U.S. at 179. The Petition establishes (pp. 14-21) that the cost of determining the names and addresses of class members to whom the class notice is to be sent is a part of notice costs, and therefore to be borne by plaintiffs. Plaintiffs' brief is wholly unresponsive to the significant conflict between the decision of this Court in *Eisen IV* and the en banc decision below. Indeed, plaintiffs assert that there is no conflict, solely because this Court did not in *Eisen IV explicitly* address the possibility that the Federal discovery rules might be claimed to govern class member identification and the costs thereof. (Brief in Opposition, pp. 23-24.) Plaintiffs' argument assumes that in not expressly negating application of the discovery rules, this Court intended tacitly to authorize their application wherever possible in connection with the giving of notice for class action purposes. There is absolutely no support in the language of the *Eisen IV* opinion for any such interpretation, and plaintiffs refer to none.

Perhaps because of the inherent conflict between the decision of this Court in *Eisen IV* and the en banc majority, plaintiffs endeavor to forestall this Court's review, by stating: "The facts and circumstances in this case are peculiar and not likely to recur." (Brief in Opposition, p. 14.) This present claim of uniqueness is inconsistent

with and in striking contrast to the position heretofore taken by the same counsel in an affidavit in support of plaintiffs' petition for rehearing en banc, wherein he stated:

> "Said decision of the Court [the three-judge panel herein] concerns *complex and novel issues of vital importance in the prosecution of class actions* under Rule 23 of the Federal Rules of Civil Procedure, particularly concerning the notice requirement and the allocation of the costs of identification of class members. . . ." (emphasis added)

The issues in this case are not unique. They will arise in any class action in which defendants' records relating to class members (be they stockholders, customers or the like) are stored in a computer, which is ever more likely to eventuate in our increasingly technological society. As stated in the en banc minority opinion below:

> "We expect that until the Supreme Court intervenes this court will be asked to further rule on this issue. The burden is not inconsiderable." (App. E, pp. 54a-55a n.5.)

In reaching this conclusion, the minority noted among other things the ever increasing volume of class actions, from 2,717 filed in federal courts in 1974 to 3,584 filed in 1976, an increase of more than 25%. (Petition, p. 12 n.16.)

The widespread importance of the issue here presented for review is further evidenced by the fact that the Petition and plaintiffs' brief in opposition, which are not intended to comprise a complete presentation of relevant decisional law, cite more than twenty-five recent cases treating the question of which party should bear class identification costs.[4] Contrary to plaintiffs' assertion (Brief in Opposi-

[4] Defendants maintain, moreover, that the decision below has significance far beyond this specific issue and that it will have a

tion, pp. 17-18.), some of these cases have required that plaintiffs bear the costs of class member identification pursuant to this Court's decision in *Eisen IV*. *E.g., Popkin* v. *Wheelabrator-Frye, Inc.*, CCH Fed. Sec. Law Rep. ¶95,411 at p. 99,090 (S.D.N.Y. 1976); *In re Sugar Industry Antitrust Litigation*, 73 F.R.D. 322, 359-60 (E.D. Pa. 1976). The large majority of such cases has treated identification costs as part of the expense of notice and has imposed identification costs on plaintiffs. (Petition, pp. 15-16 n.17.) As indicated in the Petition (p. 16 n.17, ¶2), a few of these cases have attempted to distinguish between identification and notice and have imposed identification costs on defendants. These continuing conflicts and the confusion between and within the Circuits, which will be exacerbated if the decision below is permitted to stand without review by this Court, demonstrate the importance of granting certiorari herein.[7]

Since the decision below is in conflict with and substantially undercuts this Court's decision in *Eisen IV* on a matter of major importance, it should be reviewed and reversed.

significant and undesirable effect in numerous civil suits involving discovery, both in and outside the class action context.

[7] On the basis of requests made of defendants' counsel for the briefs filed below and the Petition filed herein, it appears that law reviews and legal commentators regard this case as significant and have taken an active interest in its progress. Doubtless, plaintiffs' counsel has received similar requests.

II.

Plaintiffs' Contentions Lack Merit on the Issue that the Decision Below Directly Conflicts with the Decision of the Fifth Circuit in *In re Nissan Motor Corp. Antitrust Litigation* and Will Cause Confusion in Numerous Class Actions Unless Resolved by this Court.

Plaintiffs argue that the decision below does not conflict with the decision of the Fifth Circuit in *In re Nissan Motor Corp. Antitrust Litigation*, 552 F.2d 1088 (5th Cir. 1977) (*"Nissan Motor"*), on two grounds, both of which lack substance.

The first of plaintiffs' contentions is that in *Nissan Motor* information as to the names and addresses of class members was not contained in computer tapes as in the instant case. This alleged distinction between class members names and addresses contained in computer records and information manually recorded is not merely irrelevant but borders on the frivolous.[8] In *Nissan Motor*, the Fifth Circuit stressed that because the records containing the class members' names and addresses could be "examined as readily by the class representatives as defendants" there were no "peculiar circumstances which would warrant a departure from [the] general rule . . . [that] the class representatives must be prepared to accept the concomitant responsibility of identifying absentee class mem-

[8] The *Nissan Motor* court did not, either by reference to *Foster* v. *Maryland State Savings and Loan Ass'n*, 1974-2 CCH Trade Cases ¶75,277 (D.D.C. 1974), or in any other way, suggest that it would have ruled differently had the class information been computerized. The *Nissan Motor* court noted that in *Foster* "the class information was *readily available* to the defendant from its computer tapes. . . ." 552 F.2d at 1101 n.16 (emphasis added). The issue here presented arises because the class information is *not* readily available to the instant defendants.

bers as well as paying the costs of their individual notice." 552 F.2d at 1102. Here, as in *Nissan Motor,* the records from which a list of the names and addresses can be compiled are fully available to plaintiffs, who can examine the records and extract the information they desire as easily and as effectively as can the defendants. The plaintiffs do not deny this.

Plaintiffs' second ground for distinguishing *Nissan Motor* lacks a foundation in fact, and is based on the erroneous claim that defendants' opposition to the class redefinition proposed by plaintiffs "necessitated" the expense of class member identification. In fact, the district court had indicated repeatedly that the possible harm to the Fund impelled the court to limit the delivery of notice to class members only. Accordingly, as briefly noted in the Petition (p. 32), the district court's refusal to redefine the class to exclude persons who were not current Fund shareholders but who had made purchases during the relevant period, as sought by plaintiffs, did not affect identification costs, since substantially the same processes would be required to identify from the Fund's list of current shareholders those who purchased shares during the class period. Moreover, the issues of class definition and class member notification are logically and should remain legally distinct.

Plaintiffs, however, offer no explanation whatsoever as to how the decision below possibly can be squared with the unequivocal holding of the Fifth Circuit that, rather than being controlled by the Federal civil discovery rules, identification of class members' names and addresses is part and parcel of plaintiffs' obligation to provide individualized notice pursuant to Rule 23(c)(2), and that, in the usual case, as here, plaintiffs must pay class member identification costs.

The decision below is in conflict with the decision of the Fifth Circuit and involves an important question of Federal law which should be settled by this Court.

III.

Plaintiffs' Contentions Lack Merit on the Issue that the Decision Below Will Have the Effect of Improperly Authorizing Discovery Beyond the Scope Permitted by Rule 26(b)(1).

Even assuming that the court below could consider the discovery rules although they were not at issue in this case in the district court,[10] the determination of the names and addresses of the instant class members in the circumstances here present is beyond the scope of discovery authorized by Rule 26(b)(1).

Plaintiffs' argument misstates that portion of the Petition (pp. 25-27) pertaining to the limitations of permissible discovery imposed by the subject matter relevance test of Rule 26(b)(1). Thus, plaintiffs state that "defendants contend that information as to the names and addresses of class members may not be obtained pursuant to the discovery rules . . . *presumably because [they] relate to class action requirements in the case.*" (Brief in Opposition, p. 20.) (emphasis added) To the contrary, the defendants maintain that the names and addresses are beyond the scope of discovery precisely because they do *not* relate in any way whatsoever to the class action requirements under Rules 23(a) and 23(b) which must be pleaded and proved

[10] Under such circumstances, the Third Circuit has refused to apply the discovery rules to compel non-party broker-dealers, at their own expense, to effect class member identification. *In re Penn Central Securities Litigation,* No. 76-2139, Slip op. at 13-14 (3d Cir. August 5, 1977).

(such as common questions, numerousness of the class members and the like), nor to the jurisdiction of the court, nor to any existing or anticipated substantive issue in this case. Because this information is not relevant to the "subject matter" of the action as required by the Rule 26(b)(1), it is not discoverable. For this reason, the en banc dissenters admonished the majority that the class members' names and addresses are "sought simply for notification purposes and not discovery in any sense in which that process has ever been defined." [11] (App. E, p. 54a.)

In sharp contrast to material that properly may be obtained through discovery, plaintiffs here do not seek the class members' names and addresses for their informational value or their relevance to the subject matter of the action. Indeed, plaintiffs do not in any real sense wish to obtain any information. What they desire is that the Fund shall pay the substantial costs of programming its transfer agent's computers so as to assure that the class action notices will be properly distributed to the persons that plaintiffs and their counsel are seeking to represent. Under the mantle of discovery, the plaintiffs have attempted to transfer to the defendant Fund responsibility for and the

[11] Plaintiffs contend that because they were permitted limited discovery of the Fund's transfer agent in connection with the motion to designate this a class action, there is no "logical basis" for not including class member identification under the discovery rules. (Brief in Opposition, p. 22.) This contention is without merit. The discovery authorized below related to the subject matter of the case, i.e., whether the names and addresses of prospective class members could be ascertained through reasonable effort so that notice could be given as required if the action were to be maintaind as a class action as requested in the complaint. Having determined what notice is required by Rule 23, further discovery in this area is not relevant to the subject matter. It is both logical and proper to refuse to extend discovery for the sole purpose of transferring to defendants the responsibility and expense of performing mechanical tasks necessary to comply with notice requirements. Indeed, this was the very position taken by the Fifth Circuit in *Nissan Motor*, 552 F.2d at 1102.

cost of performing one of several mechanical tasks that are a necessary part of providing the individual notice required by Rule 23(c)(2) if plaintiffs are to obtain the benefits of a class action.

Since the decision below evades the result of this Court's decision in *Eisen IV* and will have the effect of improperly enlarging the scope of discovery beyond that authorized by Rule 26(b)(1), it should be reviewed and reversed by this Court.

CONCLUSION

Plaintiffs conclude their brief in opposition (p. 33) by listing three reasons why they claim this Court should not review the decision below:

1. They claim that this case "presents a unique set of circumstances that is not likely to recur." On the contrary, it is not the "circumstances" that are unique but the specious claim of plaintiffs (adopted by the en banc majority) that ascertainment of the names and addresses of the members of the class is not a necessary and integral part of giving the individual notice required by Rule 23(c)(2), but is somehow a separate matter governed by the discovery rules.

2. Plaintiffs claim that this case does not involve "principles the settlement of which is of importance to the public as distinguished from the parties." On the contrary, the very large and increasing number of class actions filed and pending in United States courts throughout the country (as noted in the dissenting opinion of Circuit Judge Mulligan, App. E, pp. 54a-55a, n.5.) attests to the importance of reviewing the decision of the court below and resolving the controversy and confusion which now

exists with respect to the issues herein and which will be magnified if this Court permits the decision to stand without review.

3. Finally, plaintiffs claim that there is not "a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeal." On the contrary, the Fifth Circuit decision in *Nissan Motor* reaches a conclusion and is based on a principle of law flatly in conflict with the decision of the Second Circuit herein.

Accordingly, the Petition should be granted and, upon review, the decision below should be reversed.

Dated: New York, New York
October 7, 1977

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